



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/17095/2016

THE IMMIGRATION ACTS

Heard at Field House
On July 16, 2018

Decision & Reasons Promulgated
On July 25th, 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

MR HAKEEM OLAHANI KEHINDE
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Ferguson, Counsel, instructed by Ineyab Solicitors

For the Respondent: Mr Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. No anonymity order is made.
2. The appellant is a Nigerian national who initially entered the United Kingdom on September 18, 2005 with entry clearance as a student. His leave was subsequently extended as a student until May 31, 2009 at which time he applied for leave to remain as a spouse. This was granted initially until November 6, 2010.

3. The appellant lodged an application for leave to remain on March 17, 2016 but this was refused by the respondent on June 27, 2016.
4. The appellant lodged grounds of appeal under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 on July 17, 2016. His appeal came before Judge of the First-tier Tribunal Plumptre (hereinafter called "the Judge") on November 7, 2017 and in a decision promulgated on November 29, 2017 the Judge dismissed his appeal under the Immigration Rules and on human rights grounds.
5. The appellant appealed this decision on December 13, 2017. The grounds argued the Judge had erred by failing to adequately consider the best interests of the children, by failing to make clear findings, by applying too high a standard test when considering whether the appellant had established sole parental responsibility and by carrying out an inadequate proportionality assessment under article 8 ECHR.
6. Permission to appeal was refused by Judge of the First-tier Tribunal Holmes on April 6, 2018. Permission to appeal was renewed and Upper Tribunal Judge Plimmer gave permission to appeal on May 22, 2018 on the following basis:
 - (a) There was an arguable "Robinson" error in the Judge's decision because having accepted the children were living with their father and the elder child was a "qualifying child" under section 117D of the 2002 Act the Tribunal was obliged to make a finding on whether the appellant had a genuine and subsisting parental relationship with the qualifying child for the purposes of section 117B(6) of the 2002 Act.
 - (b) The references to sole responsibility in paragraphs 30 and 35 of the Judge's decision were unhelpful.
 - (c) It was arguable the Tribunal failed to attach significant weight to the length of residence of the qualifying child when addressing "reasonableness" for the purposes of both paragraph 276ADE HC 395 and section 117B of the 2002 Act and the Tribunal failed to identify any "powerful reasons" for removal as per MA (Pakistan) V SSHD [2016] EWCA Civ 705 and MT and ET (child's best interests; ex tempore pilot) Nigeria [2018] UKUT 00088 (IAC).
7. At the commencement of the hearing Mr Bramble accepted there had been an error in the way the Judge had dealt with the issues. Although the Judge acknowledged there was a qualifying child she had not attached sufficient weight to the fact that section 117B(6) of the 2002 Act, section EX.1 of Appendix FM of the Immigration Rules, paragraph 276 ADE(1)(vi) and the respondent's Family Migration policy each referred to the test being the reasonableness of requiring a parent to leave the United Kingdom where there was a qualifying child. The assessment carried out at paragraph 37 of the decision was insufficient and he invited the Tribunal to set aside the article 8 decision and to remake it.
8. Ms Ferguson confirmed that she did not intend to call any additional evidence save that she had the end of year school reports and reminded the Tribunal that one of the

other children, Kameelah, had also now been living in the United Kingdom for more than seven years and she too should have her case considered under section 117B(6) of the 2002 Act. Khaleel, the original qualifying child, had been born in the United Kingdom and had now been residing here for just over 9 ½ years.

9. Mr Bramble acknowledged these matters and accepted that the test for Khaleel was whether he satisfied paragraph 276ADE(1)(iv) HC 395 which was exactly the same test as that set out in section 117B(6) of the 2002 Act and section EX.1 of Appendix FM of the Immigration Rules.
10. He also accepted that there were no adverse factors under section 117B of the 2002 Act because whilst there had been a period during which the appellant had been here unlawfully he accepted that the appellant had arrived here lawfully and had been granted status to remain as a spouse during which time the children were born.

FINDINGS

11. The appellant had applied to remain both under the Immigration Rules and under article 8 ECHR. The appellant's immigration history is set out above and it is common ground that he was here lawfully until September 2013 when his leave expired.
12. When he applied to extend his stay, the respondent refused his application and on appeal that decision was upheld. Upper Tribunal Judge Plimmer had given permission to appeal and identified two issues which ultimately are connected as they both relate to the children of the family.
13. Mr Bramble accepted that at the date of application one of the appellant's children, Khaleel, was a qualifying child both for the purposes of the Immigration Rules and under section 117B(6) of the 2002 Act.
14. The Court of Appeal in MA (Pakistan) made clear that when assessing reasonableness under both the Immigration Rules and section 117B(6) of the 2002 Act (article 8 assessment) there was a presumption that the appellant would succeed unless there were "powerful reasons" for his removal.
15. When this matter came before me, Mr Bramble accepted that there were no such reasons. Additionally, there was now also a second qualifying child who would come within the provisions of section 117B(6) of the 2002 Act due to the length of time she had now been living here.
16. Based on the evidence provided there was clearly a genuine and subsisting relationship between the appellant and his children. The appellant spoke English and had demonstrated an ability to be financially independent and whilst he was no longer in a relationship with the children's mother he was the primary carer of his children. He afforded access to the children's mother twice a week but that was the extent of his involvement with her. Social services had been involved with the children.

17. Bearing in mind the guidance both in MA (Pakistan) and the respondent's own guidance I am satisfied that given the evidence provided to the First-tier Tribunal and the length of time the children had been living here it would be unreasonable to require the children to leave the United Kingdom and by implication it would be unreasonable to require the appellant to leave the United Kingdom in such circumstances.
18. Whilst the appellant's immigration history contains a period of unlawfulness I take on board Ms Ferguson's submission that no weight should be attached to this in light of MT and ET but in any event there was no evidence of a poor immigration history.
19. The original Judge's decision was set aside because insufficient weight was attached to these matters and I am satisfied that when these matters are placed into the balancing assessment then the appellant must succeed under article 8 ECHR. The importance of two children living in the United Kingdom for more than seven years cannot be overstated especially in circumstances where there are no powerful reasons requiring the appellant to leave.
20. For the record, the test applied under article 8 (section 117B(6) of the 2002 Act) is the same test as would have been applied under section EX.1 of Appendix FM of the Immigration Rules and paragraph 276ADE(iv) HC 395. It is therefore arguable that this appeal would have succeeded under the Immigration Rules if such an avenue had been open.
21. I therefore allow the appeal on human rights grounds.

DECISION

22. There was an error in law for the reasons set out above and I set aside the decision.
23. I have remade the decision and I allow the appeal on human rights grounds.

Signed

Date 16/07/2018



Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT
FEE AWARD

I make no fee award as I have allowed the appeal based on the additional evidence that has been lodged after the application had been refused.

Signed

Date 16/07/2018

A handwritten signature in black ink, appearing to read 'SPAL' with a flourish underneath.

Deputy Upper Tribunal Judge Alis